

(412)644-5754

DATE: JULY 23, 1998

CASE NO: 97-SCA-4

In the matter of:

SUBURBAN AIR FREIGHT, INC.,
GEOFFREY GALLUP,
MARK P. MEYER, and
JAMES V. ARMSTRONG,
Respondents

**DECISION AND ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION AND DISMISSING COMPLAINT**

The case arises under the McNamara-O'Hara Service Contract Act of 1965 (Act), as amended, 41 U.S.C. § 353 *et seq.*, and the applicable regulations promulgated at Title 29 of the Code of Federal Regulations. Respondent filed a Motion for Summary Decision on February 19, 1998. The U.S. Department of Labor (Department) filed a response and a Cross-Motion for Summary Decision on April 3, 1998. Respondent filed a reply to the Department's motion on May 11, 1998.

In support of its motion for summary decision, Respondent maintains that it is entitled to judgement as a matter of law as its pilot-employees meet the professional exemption of the Act. The Act exempts from its provisions "any person employed in a bona fide executive, administrative or professional capacity, as those terms are defined in part 541, title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations." Respondent claims its pilots meet the salary and duties elements of the streamline test at 29 C.F.R. § 541.315 for a professional under the Act.

Findings of Fact and Conclusions of Law

The Code of Federal Regulations sets forth the standard for a summary decision in this matter at 29 C.F.R. § 18.40-18.41. If the moving party can show there is no genuine issue of material fact, that party is entitled to summary decision. The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary decision. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). Substantive law identifies which facts are material for purposes of summary decision, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of a summary decision. *Anderson*, 477 U.S. at 248.

As the burden to prove the existence of an exemption rests on the employer, the regulations permit an employer to use either the “streamline test” at 29 C.F.R. § 541.315 or the “long test” at 29 C.F.R. § 541.3 (a)-(e). *See Paul v. Petroleum Equipment Tools Co.*, 708 F.2d. 168, 170 (5th Cir. 1983). Respondent, in its Memorandum Brief in Support of Motion for Summary Decision, opts for the “streamline test” described at 29 C.F.R. § 541.315:

(a) Except as otherwise noted in paragraph (b) of this section, the definition of “professional” contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least \$250 a per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in activity of imparting knowledge, which includes work requiring consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the “learned” professions or in an “artistic” profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee’s qualifications in detail under § 541.3 (a) through (e).

The “streamline test” can be broken down into two components: the salary element, is an employee earning a salary of \$250 a week or more; and the duties element, is an employee in a “learned” or “artistic” profession?

Salary Element

Respondent states that its pilots are compensated on a per trip or “unit” basis, plus lodging, a per diem, health insurance, plus optional participation in a 401(k) plan, and additional “flat trip rates” for all flights for which the pilot’s earnings exceed the base minimum salary. (Respondent’s Memorandum Brief in Support of Motion for Summary Decision, ¶ 8-9). Pilots earn a base minimum salary of \$18,000. (Id. at ¶ 9). The routes its pilots fly pay from \$510 to \$1080 a week based on per trip amounts under United States Postal Service (USPS) contracts ranging from \$85 to \$180 a trip. (Id. at ¶9). Under the USPS contracts, the routes are flown six times a week (Id. at ¶ 7). These fixed, daily rates of compensation were established to exceed all wages, fringe benefits, holiday amounts, and portions of vacation pay that would accrue as a result of performing daily scheduled flights. (Id. at ¶ 13) These amounts also include a

subjectively determined amount to compensate pilots for other factors such as number of landings and desirability of outstations. (Id. at ¶ 13) These rates are meant to be competitive to attract capable, experienced personnel. (Id. at ¶ 13)

Respondent states that paying its pilots per route flown is a “unit” method for compensating its pilots who perform services under its United States Postal Service contracts and that this method is in accordance with the provisions of 29 C.F.R. § 4.166, which states in relevant part, “. . . Employees may be paid on a daily basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement . . .” (Id. at ¶ 10) Pilots receive cash or cash equivalents in addition to the flat trip rates for lodging and as per diem. (Id. at ¶ 8) The fixed, daily rates of compensation were paid without any reduction in earnings or “docking” of pay. (Id. at ¶ 14) Pilots earned the fixed trip rate regardless of the amount of time it took them to accomplish their tasks, it was not docked if they completed the route ahead of schedule. (Id. at ¶ 19, 14) Respondent hired certain pilots as “floaters” to fly a variety of routes and aircraft rather than a specific contract route. These floaters are guaranteed a minimum salary of \$21,600 a year. (Id. at ¶ 18) Respondent also states that there are certain pilots who have other employment or who only wish to fly occasional flights rather than a regular scheduled flight, but that these pilots are compensated with the same route rates and benefits for the services they do perform, although they do not participate in the minimum salary guarantee. (Id. at ¶ 20)

Respondent argues that its form of compensation to its pilots by paying them a flat trip rate per daily flight falls within the definition of “salary” contained in the governing regulations. 29 C.F.R. § 541.118 (b) states:

Minimum guarantee plus extras. It should be noted that the salary may consist of a predetermined amount constituting all or part of the employee’s compensation. In other words, additional compensation besides the salary is not inconsistent with the salary basis of payment. The requirement will be met, for example, by a branch manager who receives a salary of \$250 or more a week and in addition, a commission of 1 percent of the branch sales. The requirement will also be met by a branch manager who receives a percentage of the sales or profits of the branch, if the employment arrangement also includes a guarantee of at least the minimum weekly salary (or equivalent for a monthly or other period) required by the regulations. Another type of situation in which the requirement is met is that of an employee paid on a daily or shift basis, if the employment arrangement includes a provision that the employee will receive not less than the amount specified in the regulations in any week in which the employee performs any work. Such arrangements are subject to the exceptions in paragraph (a) of

this section. The test of payment on a salary basis will not be met, however, if the salary is divided into two parts for the purpose of circumventing the requirement of payment “on a salary basis”. For example, a salary of \$300 in each week in which any work is performed, and an additional \$55 which is made subject to the deductions which are not permitted under paragraph (a) of this section. (Emphasis added)

Respondent contends that pilots were given a minimum guarantee of \$18,000 a year and that they were compensated on a daily per route basis. They would receive the per route rate for any flights they flew above the minimum guarantee. Respondent states that pilots earned from \$510 to \$1,080 a week, which is well above the \$250 a week salary required for a professional by the streamline test at 29 C.F.R. § 541.315.

Respondent also argues that the professional exemption can be met if its pilots are paid on a fee basis. Fee arrangements are defined at 29 C.F.R. § 541.313 as:

(a) The requirements for exemption as a professional (or administrative) employee may be met by an employee who is compensated on a fee basis as well as one who is paid on a salary basis.

(b) Little or no difficulty arises in determining whether a particular employment arrangement involves payment on a fee basis. Such arrangements are characterized by the payment of an agreed sum for a single job regardless of the time required for its completion. These payments in a sense resemble piecework payments with the important distinction that generally speaking a fee payment is made for the kind of job which is unique rather than for a series of jobs which are repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a single given task are not considered payments on a fee basis. The type of payment contemplated in the regulations of subpart A of this part is thus readily recognized. (Emphasis added.)

However, from the language of the definition, it is clear that Respondent’s pilots cannot be considered to be paid on a fee basis.

The Department argues that the minimum guarantee of a salary contained at 29 C.F.R. § 541.118(b) must be weekly and that a monthly or yearly guarantee does not fulfill the regulations if it does not convert to a guaranteed weekly amount paid each pay period.

(Complainant's Brief in Opposition to Respondent's Motion for Summary Decision and In Support of Complainant's Cross-Motion for Summary Decision at pg. 14.)¹ The Department argues that the unit method by which Respondent's pilots are compensated can never constitute a salary because the pilots are paid based on the quantity of their work and this by definition cannot be considered salary within the definition of 29 C.F.R. § 541.118. Further, the Department argues that paying the pilots on a per trip basis defeats any argument of a minimum guarantee. The Department cites the affidavits of Kenneth Brockman, Byran Stackley, and John Foss in support of its argument that the pilots do not have a minimum guarantee. (DX M, N, U). However, all three pilots state they were paid a specified amount per trip per route under a United States Postal Service Contract and that they flew the route six times a week. (DX M, N, U)

The Department criticizes Respondent's argument that its pilots were guaranteed a minimum yearly salary of \$18,000 and that once a pilot met this minimum, any trips he flew became additional compensation. It cites to *Brock v. Claridge Hotel and Casino*, 846 F.2d. 180 (3rd Cir. 1988) in support of its argument, stating that all of Respondent's pilots have the same guarantee yet they are paid a different amount according to the routes they fly, so pilots flying the higher paid routes earn their minimum guarantee faster. In *Claridge*, gambling supervisors were guaranteed a weekly salary of \$250, but it was determined they were compensated on an hourly basis and it was rare that supervisors worked enough hours to exceed the guarantee of \$250 a week. *Claridge* supports the Department's argument as it noted that, "The better paid the supervisor, the less protection the 'salary' provides." However, the Third Circuit in *Claridge* defined the issue before it as whether an otherwise hourly wage can be transformed into payment on a salary basis by virtue of the guaranteed minimum weekly payment. *Claridge* at 184. The Third Circuit also stated in reference to 29 C.F. R. § 541.118 (b):

On the other hand, the third example in the regulation specifically allows payment of salary based on days or shifts worked, so long as the minimum weekly payment is guaranteed. The only difference between this form of payment and that at issue is the increment of time which forms the basis of the wage--day or shift versus the hour We decline to hold on the record before us that shift compensation provides an employee no more latitude than hourly compensation. *Claridge*, at 185.

Respondent, in its Memorandum Brief in Opposition to Complainant's Motion for Summary Decision, cites to *Simmons v. City of Ft. Worth*, 805 F. Supp. 419 (N.D. Texas 1992)

¹ The Department cites to 29 C.F.R. § 541.117 (a) in support of its argument. (Id. at pg. 15). However, it is noted that 29 C.F.R. § 541.117 applies to the amount of salary required for an employee employed in a bona fide executive capacity. The regulations governing the amount of salary or fees required for individuals employed in a bona fide professional capacity can be found at 29 C.F.R. § 541.311 and require a professional to earn \$170 a week, \$340 biweekly, \$368.33 semi-monthly or \$736.67 monthly.

as support for its position that its unit or daily method of pay with its minimum guarantee can be considered a salary. In *Simmons*, fire department employees who worked shifts and received their paychecks on a biweekly basis which fluctuated according to the number of shifts worked in a pay period. The court found these workers exempt as it noted that the employees in question were entitled to at least \$250 a week without the possibility of reduction based on the quality or quantity of the work performed and were guaranteed to work for an eighty-hour period. Respondent argues that this case is analogous as the routes its pilots fly are scheduled six days a week as required by the U.S.P.S. contracts and pilots are paid for every route they fly. (*Id.* at pp.8, 11). As the regulations recognize a daily or shift form of compensation as payment of a salary as long as an individual has a guaranteed minimum salary, the Department's argument fails if Respondent is paying its pilots a minimum guarantee.

The Department argues that Respondent did not pay its pilots a minimum guarantee as proven by Respondent's own records: "However, Respondents also assert that employees had a "guarantee" of either \$18,000 per year, 'which amounts to \$346.00 per week' (Gallup Affidavit ¶ 19), or \$1,800 per month, or \$21,600² per year" (Gallup Affidavit ¶ 28)." (Brief at pg. 16) A minimum salary of \$18,000 a year amounts to \$1,500 a month, \$346 a week, or \$750 semi monthly. Respondent's payroll records reveal that its pilots were paid on a semi-monthly basis, a fact which is not in dispute, (DX L) so in order to making the minimum guarantee of \$18,000 a year, pilots needed to be making at least \$750 a pay period. The Department has compiled a list of pilots paid less than \$750 semi-monthly at its Appendix A. (A copy of the Department's Appendix A is attached.)

Appendix A demonstrates that in addition to being paid less than \$750 semi-monthly, several entries are for less than the \$541.66³ semi-monthly required under the streamline test, or the \$368.33 semi-monthly required under the long test as a minimum for a professional's salary. This information would appear to defeat Respondent's arguments that its pilots were guaranteed a minimum salary. However, a further analysis of the Department's Appendix A reveals that the evidence has been mischaracterized. Most of the qualifying entries are for pay periods when pilots did not fly the six days a week per route required. A salary based on a minimum guarantee is still subject to the deductions permissible at 29 C.F.R. § 541.118 (a)(2) and (3) which state in relevant part:

²The figure \$21,600 comes from the minimum salary "floater" pilots are guaranteed.

³This amount is based on earning \$250 a week, but being paid on a semi-monthly basis of twenty-four times a year.

(2) Deductions may be made, however, when an employee absents himself from work for a day or more for personal reasons, other than sickness or accident. Thus, if an employee is absent for a day or longer to handle personal affairs, his salaried status will not be affected if deductions are made from his salary for such absences.

(3) Deductions may also be made for absences of a day or more occasioned by sickness or disability (including industrial accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by both sickness and disability. . . .

It should be noted that deductions to an employee's salary occasioned by the employer or the operating requirements of the business are not permitted. *See* 29 C.F.R. § 541.118 (a)(1).

Attached to this Decision and Order is a table that analyzes pilots' salary in terms of working the entire pay period for all of the 1992, 1993 and most of the 1994 entries on the Department's Appendix A based on Respondent's 1992, 1993 and 1994 payroll records. This could not be done for some of the 1994 and all of the 1995 and 1996 entries as the payroll records in evidence are not broken down daily by pay period. Based on this analysis, none of the pilots would have earned less than the \$541.66 semi-monthly necessary for a professional's salary under the streamline test if they had flown their routes all of the eligible days in the pay period. Pilots who would have earned less than the \$750 minimum guarantee semi-monthly have been highlighted. Only two pilots, Michael Freeman (MF) and Ronald Facklam (RF) ever earned less than Respondent's minimum guarantee. Respondent, in its Memorandum Brief in Opposition to Complainant's Motion for Summary Decision, states that Michael Freeman flew routes numbered "15" and "9" which had been previously identified as flights flown for the United Parcel Service and not U.S.P.S. flights, so his status is not at issue. (*Id.* at pg. 19). Respondent states that Ronald Facklam also performed flights under United Parcel Service Contracts and thus, his status is not at issue. (*Id.* at pg. 21).⁴ As the Table indicates, Respondent's pilots, if they flew the six times a week per route required, made over the \$750 guaranteed semi-monthly. A perusal of

⁴ Respondent also states that Steve Evans (SE) flew part-time and on United Parcel Service Flights. (Respondent's Memorandum Brief in Opposition to Complainant's Motion for Summary Decision, at pg. 20) John Foss (JF) was employed by Respondent for less than two months and walked off the job mid-day. (*Id.* at 21) David Postuma (DP) flew United Parcel Service flights. (*Id.* at pg.21) Richard Rash (RR) flew United Parcel Service flights, but occasionally filled in on U.S.P.S. flights, although none during the relevant time period. (*Id.* at pgs. 21-22) Joseph Graber (JG) quit May 15, 1994. (*Id.* at pg. 22) Joseph Blankenship (JB) worked part-time as he was a full-time student. (*Id.* at pgs. 22-23) Richard Smith (RS) received less than the minimum salary for the pay periods ending September 15, 1996 and September 30, 1996 because he took time off for personal reasons.

Respondent's payroll records from 1995 and 1996 also indicates that generally, Respondent's pilots were making over the \$750 guaranteed semi-monthly.

The Department states that it disputes that Respondent pays its pilots on a flat trip basis and provides additional compensation in the form of lodging and a per diem as defined by 29 C.F.R. § 531.32 and 29 C.F.R. § 4.167. However, the Department does not offer its reasons for disputing that Respondent's pilots are paid the additional compensation. Respondent states it furnished cash or a cash equivalent to pilots lodging in Des Moines, Iowa; Cedar Rapids, Iowa; and Alliance, Nebraska at a rate of \$29.50 per day. (Affidavit of Geoffrey Gallup at ¶ 18) Pilots also received cash or a cash equivalent of up to \$15 per day in a per diem allowance for contracts H6801, H5241, H5001, CID-96-02EM, and DSM-96-02EM and up to \$7.50 per day under contract D4R-91-01. (Id. at ¶ 18)

Respondent's unit method of compensation is analogous to the shift or daily method of paying a salary described at 29 C.F.R. § 541.118(b). This is especially true as the pilots' salary was not subject to a reduction based on the amount of time it took to fly the route or their performance in flying the route. Respondent has made a showing that its pilots were paid the minimum guarantee of \$18,000 it alleges it pays its pilots. Further, pilots are compensated more than the \$541.66 required semi-monthly by the streamline test. Therefore, I find that Respondent's pilots are making more than the \$250 a week required by 29 C.F.R. § 541.315. The Department has not made a satisfactory showing that Respondent's pilots were not earning a salary and that even if they were, the pilots were earning less than the \$250 a week required by 29 C.F.R. § 541.315. Thus, Respondent's pilots meet the salary element of the streamline test.

Duties Element

Respondent cites *Paul v. Petroleum Equipment Tools Co.*, 708 F.2d. 168 (5th Cir. 1983), in support of its Motion for Summary Decision. In *Paul*, the Fifth Circuit held that a company airline pilot met the streamline test for the professional exemption under 29 C.F.R. §541.315 in a case arising under the Fair Labor Standards Act (FLSA). The FLSA is governed by the same regulations at 29 C.F.R. § 541 for determining whether an employee is employed in a bona fide executive, administrative or professional capacity as the SCA. The pilot in *Paul* held an airline transport certificate, a flight instructor certificate, an instrument rating and ratings to fly both single engine and multi-engine airplanes. 708 F.2d. at 169. He was also compensated by a monthly salary ranging from \$1,700 to \$2,081. 708 F.2d. at 169. As it is clear that Paul was earning \$250 a week, the Court applied the streamline test. Under the streamline test, the Court found that Paul was engaged in a "learned" profession based on the Federal Aviation Agency's (FAA) requirements for a pilot of Paul's experience and skill. The Court found that the FAA regulations "demonstrate that a pilot with a commercial license and instrument rating indeed has the knowledge in a field of science or learning." 708 F.2d. at 172.

Respondent argues that its pilots' primary duty consists of exempt work related to their level of experience as airplane pilots. Respondent states that the pilots have unsupervised control

over the flights. It is the pilots' decision whether to fly, whether to accept a particular airplane, to ensure the airplane is safe to fly, and to operate in accordance with the Air Carrier certificate holders duties under safety and operating regulations as Respondent could lose its certificate if a pilot commits a violation. (Id. at ¶ 13). Respondent states that its pilots must have, at a minimum, a commercial pilot certificate with instrument and multi-engine ratings to fly under Respondent's FAA Air Carrier Operating Certificate. (Id. at ¶ 9). The FAA regulations at 14 C.F.R. § 135.243(c) requires that a pilot in command flying under an Air Carrier Operating Certificate has to have a commercial pilot certificate with an appropriate category and class ratings; at least 1,200 hours of flight time as a pilot; and an instrument rating or an airline pilot transport certificate with an airplane category rating. The Department agrees that these are the applicable requirements, but argues that Respondent's pilots are not in the same sub-class as the pilot in *Paul* as its pilots do not have to have an airline transport pilot certificate or its equivalent. (Brief in Opposition to Respondent's Motion for Summary Decision and In Support of Complainant's Cross-Motion for Summary Decision at pg. 12).

To obtain an airline transport pilot certificate with an airplane category and class rating, a pilot must have at least 1500 hours as a pilot. *See* 14 C.F.R. § 61.159. Respondent's pilots must have a commercial pilot's certificate, a multi-engine airplane rating, an instrument rating and 1200 hours of flight time. To receive a commercial pilot's certificate with a multi-engine rating able to transport people or property only requires 250 hours of flight time. *See* 14 C.F.R. §§ 61.129 and 61.133. The pilot in *Paul* did have his airline transport pilot certificate. However, the Fifth Circuit stated that a commercial pilot certificate with an instrument rating is a classification one notch below an airline transport certificate. *Paul*, 708 F. 2d. at 171. The court also repeatedly referred to a pilot with a commercial pilot's certificate and an instrument rating in its analysis of whether or not Paul was in a "learned" profession. Given that the threshold requirements for Respondent's pilots can be also be described as one notch below an airline transport certificate; that all of Respondent's pilots must have a commercial pilot's certificate, a multi-engine rating; an instrument rating; and a significantly more training and experience than an individual with just a commercial pilot's certificate, Respondent's pilots are in the same sub-class of pilots that was identified in *Paul*.⁵

The Department argues that Respondent's pilots are "service employees" as a matter of law. The Department refers to 29 C.F.R. § 4.156 stating that it refers to pilots and that this reference indicates that pilots were intended to be considered service employees under the Act. However, the precise language of 29 C.F.R. § 4.156 is as follows:

The term "service employee" as defined in section 8(b) of the Act does not include persons employed in a bona fide professional capacity as those terms are defined in 29 CFR part 541. Employees

⁵ Although pilots are highly skilled individuals, I question whether any pilot can be considered in a "learned" profession within the meaning of the Act and the regulations. However, I am bound by the decision in *Paul*.

within the definition of service employee who are employed in an executive, administrative, or professional capacity are not excluded from coverage, however, even though they are highly paid, if they fail to meet the tests set forth in 29 CFR part 541. Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations in part 541 of this title, are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations. (Emphasis added.)

As this provision only identifies a sub-class of pilots of which Respondent's pilots are not members, this argument is not persuasive.

The Department argues that Respondent's pilots are service employees as the Dictionary of Occupational Titles under the Service Contract Act contains an entry for airplane pilot. However, this entry states that an airplane pilot must have a commercial pilot certificate and can pilot helicopters, single, twin or multi-engine planes. As has already been stated, a commercial pilot certificate with a multi-engine rating only requires 250 hours of flight time. Respondent's pilots must have an instrument rating and a significantly more training and experience which places them in the sub-class of pilots deemed "professionals" by the definitions in *Paul*.

The Department argues that although the Wage and Hour Division has had a non-enforcement policy with respect to pilots, this policy only applies to the overtime provisions of the FLSA and is not applicable to pilots subject to the Act. It cites Wage and Hour opinion letters in support of its argument. (DX A-F). While this may be true, it does not offer an explanation as to why the decision of the Fifth Circuit Court in *Paul* is not controlling. The Fifth Circuit found that a particular sub-class of pilots was exempt from the FLSA by applying the same regulations at 29 C.F.R. § 541 that are applicable in determining whether an employee is a professional under the Act. None of these letters address this sub-class and only one of them, DX D, was actually written in response to a question concerning helicopter pilots under the Act. The court in *Paul* made a distinction between helicopter pilots and the sub-class of airplane pilots it found professionals, referring to helicopter pilots as highly-trained technicians. *Paul*, 708 F.2d. at 171. The FAA requirements to receive certification as a helicopter pilot also are not as stringent as the requirements for multi-engine airplane pilots. *See* 14 C.F.R. § 61.

Further, the Administrative Review Board's commentary, In the Matter of: Review and Reconsideration of Wage Rates for Captain and First Officer, Wage Determination 95-0229, Rev.1, as applied to United States Postal Service's Anet and Wnet Contracts for Air Transportation of Express Mail, ARB No. 97-033, July 25, 1997, indicates that *Paul* is applicable to cases arising under the Act. The Board remanded the case to the Wage and Hour Division for an initial determination of whether pilots and first officers performing work under a covered United States Postal Service Contract are exempt as professionals under the Act and stated in

relevant part that the Administrator needed to determine “whether there is any basis for distinguishing these employees from the employee whom the Fifth Circuit found exempt in *Paul v. Petroleum Equipment Tools Co.*” The Department also argues that *Paul* was wrongly decided. However, *Paul* was decided fifteen years ago and has not been overturned. Additionally, the Wage and Hour Division has had fifteen years to address the situation in *Paul*, but has remained silent.

Respondent has made a showing that its pilots are in the same sub-class of pilots identified in *Paul* and thus, they meet the duties element of the streamline test at 29 C.F.R. § 541.315. The Department has not made a showing that Respondent’s pilots are service employees as defined by the Act.

As the Department has failed to make a sufficient showing under either element of the streamline test, its Cross-Motion for Summary Decision must be denied. As Respondent has demonstrated its pilots meet the salary and duties elements of the streamline test, it has proven its pilots meet the professional exemption at 29 C.F.R. § 541.315. Thus there is no genuine issue of material fact and the complaint must be dismissed.

ORDER

IT IS ORDERED THAT:

- (1) Respondent’s Motion for Summary Decision is GRANTED;
- (2) the Department’s Cross-Motion for Summary Decision is DENIED; and
- (3) the complaint alleging violation of the Act is DISMISSED WITH PREJUDICE.

DANIEL L. LELAND
Administrative Law Judge

DLL/lwa/lab

NOTICE OF APPEAL RIGHTS: Within 40 days after the date of this decision, any aggrieved party may file a petition for review of the decision with supporting reasons. Such petition shall be submitted in writing to the Administrative Review Board pursuant to 29 C.F.R. Part 9, with a copy thereto to the Chief Administrative Law Judge. The address of the Administrative Review Board is U.S. Department of Labor, 200 Constitution Avenue, N.W., Room S-4309 FPB, Washington, DC 20210, Telephone: 202/219-4728; Facsimile: 202/219-9315. The petition shall refer to the specific findings of fact, conclusions of law, or order at issue. A petition concerning the decision on the ineligibility list shall also state the “unusual circumstances” which warrant relief from the ineligibility list.

TABLE A

| D. Pg. # | EE | Pay Period | Pay Earned | Days Flown | Amount per Day | Eligible Days in Period | Pay If Flew All |
|-----------------|-----------------|-------------------|-------------------|-------------------|-----------------------|--------------------------------|------------------------|
| 000150 | BJ | 12/15/92 | \$95 ⁶ | 1 | \$95 | 13 | \$1235 |
| 000151 | EB | 6/30/92 | \$680 | 8 | \$85 | 13 | \$1105 |
| 000153 | EB | 9/15/92 | \$680 | 8 | \$85 | 12 | \$1080 |
| 000171 | PC | 3/31/92 | \$676.42 | 8 | \$84.55 | 14 | \$1183.70 |
| 000171 | PC | 5/31/92 | \$540 | 6 | \$90 | 13 | \$1170 |
| 000172 | RA | 3/31/92 | \$461 | 4 | \$115.25 | 14 | \$1613.50 |
| 000172 | RA | 5/31/92 | \$595 | 7 | \$85 | 13 | \$1105 |
| 000172 | RA | 6/15/92 | \$425 | 5 | \$85 | 13 | \$1105 |
| 000190 | BJ | 2/28/93 | \$665 | 7 | \$95 | 11 | \$1045 |
| 000196 | COA | 8/31/93 | \$375 | 6 | \$62.50 | 14 | \$875 |
| 000196 | DP ⁷ | 4/30/93 | \$375 | 5 | \$75 | 14 | \$1050 |
| 000197 | DP | 5/15/93 | \$675 | 9 | \$75 | 13 | \$975 |
| 000201 | GL | 4/15/93 | \$697.50 | 9 | \$77.50 | 13 | \$1007.50 |
| 000223 | MF | 9/15/93 | \$136 | 1 | \$136 | 14 | \$1904 |
| 000224 | MF | 9/30/93 | \$181 | 2 | \$90.50 | 13 | \$1176.50 |
| 000224 | MF | 10/15/93 | \$200 | 4 | \$50 | 13 | \$650 |
| 000224 | MF | 10/31/93 | \$200 | 4 | \$50 | 12 | \$600 |
| 000224 | MF | 11/15/93 | \$250 | 4 | \$62.50 | 13 | \$812.50 |
| 000224 | MF | 12/15/93 | \$300 | 4 | \$75 | 13 | \$975 |
| 000224 | MF | 12/31/93 | \$506.25 | 5 | \$101.25 | 13 | \$1316.50 |

⁶The amount of compensation in Appendix A is shown as \$475.00, but on the payroll records , \$380.00 is vacation pay.

⁷A name could not be found that corresponded with these initials on the pilot list.

| D. Pg. # | EE | Pay Period | Pay Earned | Days Flown | Amount per Day | Eligible Days in Period | Pay If Flew All |
|-----------------|-----------|-------------------|-------------------|-------------------|-----------------------|--------------------------------|------------------------|
| 000224 | RR | 1/31/93 | \$700 | 9 | \$77.78 | 13 | \$1011.14 |
| 000227 | RS | 4/15/93 | \$675 | 9 | \$75 | 13 | \$975 |
| 000236 | SE | 1/15/93 | \$67.50 | 0 | | 13 | |
| 000236 | SE | 2/15/93 | \$736 | 5 | \$147.20 | 13 | \$1914 |
| 000237 | SE | 2/28/93 | \$341.35 | 4 | \$85.33 | 11 | \$939 |
| 000237 | SE | 3/31/93 | \$190 | 1 | \$190 | 14 | \$2660 |
| 000241 | SS | 4/15/93 | \$675 | 9 | \$75 | 13 | \$975 |
| 000241 | SS | 5/31/93 | \$675 | 9 | \$75 | 13 | \$975 |
| 000286 | SE | 2/28/94 | \$617.50 | 6 | \$102.92 | 11 | \$1132 |
| 000286 | SE | 4/30/94 | \$733 | 7 | \$104.71 | 13 | \$1361 |
| 000286 | SE | 6/15/94 | \$700 | 7 | \$100 | 13 | \$1300 |
| 000276 | RF | 6/30/94 | \$165.75 | 1 | \$165.75 | 13 | \$2155 |
| 000276 | RF | 7/15/94 | \$56.25 | 1 | \$56.25 | 13 | \$731 |
| 000276 | RF | 7/31/94 | \$255 | 2 | \$127.50 | 13 | \$1658 |
| 000263 | JF | 6/30/94 | \$665 | 6 | \$110.83 | 13 | \$1441 |
| 000292 | WW | 5/15/94 | \$665 | 6 | \$110.83 | 12 | \$1330 |
| 000248 | BS | 2/15/94 | \$700 | 7 | \$100 | 13 | \$1300 |
| 000250 | BS | 5/15/94 | \$400 | 4 | \$100 | 12 | \$1200 |
| 000250 | CW | 4/30/94 | \$600 | 6 | \$100 | 13 | \$1300 |
| 000250 | CW | 5/15/94 | \$697 | 9 | \$77.44 | 12 | \$929 |
| 000250 | CW | 5/31/94 | \$697 | 9 | \$77.44 | 14 | \$1084 |
| 000251 | CW | 6/15/94 | \$547.50 | 7 | \$78.21 | 13 | \$1017 |
| 000251 | CW | 6/30/94 | \$675 | 9 | \$75 | 13 | \$975 |
| 000251 | CW | 7/15/94 | \$525 | 7 | \$75 | 13 | \$975 |

| D. Pg. # | EE | Pay Period | Pay Earned | Days Flown | Amount per Day | Eligible Days in Period | Pay If Flew All |
|-----------------|-----------|-------------------|---------------------|-------------------|-----------------------|--------------------------------|------------------------|
| 000251 | CW | 7/31/94 | \$450 | 6 | \$75 | 13 | \$975 |
| 000253 | DP | 2/28/94 | \$675 | 9 | \$75 | 11 | \$825 |
| 000263 | JF | 7/31/94 | \$95 | 1 | \$95 | 13 | \$1235 |
| 000266 | JG | 5/15/94 | \$285 | 3 | \$95 | 12 | \$1140 |
| 000267 | JK | 3/31/94 | \$680 | 8 | \$85 | 13 | \$1105 |
| 000267 | KG | 1/31/94 | \$675 ⁸ | 9 | \$75 | 13 | \$975 |
| 000268 | KG | 2/28/94 | \$675 | 9 | \$75 | 11 | \$825 |
| 000269 | KG | 4/30/94 | \$600 | 8 | \$75 | 13 | \$975 |
| 000274 | MF | 1/15/94 | \$100 | 0 | | | |
| 000274 | MF | 1/31/94 | \$49.50 | 0 | | | |
| 000274 | MF | 2/15/94 | \$200 | 4 | \$50 | 13 | \$650 |
| 000274 | MF | 2/28/94 | \$200 | 4 | \$50 | 11 | \$550 |
| 000276 | RF | 6/30/94 | \$127.50 | 1 | \$127.50 | 13 | \$1658 |
| 000276 | RF | 7/15/94 | \$56.25 | 1 | \$56.25 | 13 | \$731.25 |
| 000276 | RF | 7/31/94 | \$255 | 2 | \$127.50 | 13 | \$1658 |
| 000276 | RP | 1/15/94 | \$600 | 8 | \$75 | 12 | \$900 |
| 000276 | RP | 1/31/94 | \$600 | 8 | \$75 | 13 | \$975 |
| 000277 | RP | 2/15/94 | \$675 | 9 | \$75 | 13 | \$975 |
| 000277 | RP | 2/28/94 | \$570 | 6 | \$95 | 11 | \$1045 |
| 000277 | RP | 3/15/94 | \$675 ¹⁰ | 6 | \$112.50 | 13 | \$1463 |

⁸ Plus an additional \$45 of “extra units”

⁹ Plus an additional \$38.25 of “extra units”

¹⁰ Plus an additional \$123.75 of “extra units”

| D. Pg. # | EE | Pay Period | Pay Earned | Days Flown | Amount per Day | Eligible Days in Period | Pay If Flew All |
|-----------------|-----------|-------------------|---------------------|-------------------|-----------------------|--------------------------------|------------------------|
| 000277 | RP | 4/15/94 | \$450 ¹¹ | 6 | \$75 | 13 | \$975 |
| 000281 | RR | 7/31/94 | \$700 ¹² | 9 | \$77.77 | 13 | \$1011 |
| 000282 | SB | 2/15/94 | \$700 ¹³ | 7 | \$100 | 13 | \$1300 |
| 00287 | SE | 4/30/94 | \$655 ¹⁴ | 7 | \$93.57 | 13 | \$1216 |
| 000288 | SE | 6/15/94 | \$700 | 7 | \$100 | 13 | \$1300 |
| 000289 | SS | 1/15/94 | \$720 | 8 | \$90 | 12 | \$1080 |
| 000292 | SS | 7/31/94 | \$500 | 5 | \$100 | 13 | \$1300 |

¹¹Plus an additional \$22.50 of “extra units”

¹² Plus an additional \$300 in vacation pay.

¹³ Plus an additional \$600 of vacation pay

¹⁴ Plus an additional \$68 of “extra units”

EMPLOYEES PAID LESS THAN \$750.00 PER PAY PERIOD

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|--------------|
| 000150 | BJ | 12/15/92 | \$475.00 |
| 000151 | EB | 06/30/92 | \$680.00 |
| 000153 | EB | 09/15/92 | \$680.00 |
| 000171 | PC | 03/31/92 | \$676.40 |
| 000171 | PC | 05/31/92 | \$540.00 |
| 000172 | RA | 03/31/92 | \$461.00 |
| 000172 | RA | 05/31/92 | \$595.00 |
| 000172 | RA | 06/15/92 | \$425.00 |
| 000190 | BJ | 02/28/93 | \$665.00 |
| 000196 | COA | 08/31/93 | \$375.00 |
| 000196 | DP | 04/30/93 | \$375.00 |
| 000197 | DP | 05/15/93 | \$675.00 |
| 000201 | GL | 04/15/93 | \$697.50 |
| 000223 | MF | 09/15/93 | \$136.00 |
| 000224 | MF | 09/30/93 | \$181.00 |
| 000224 | MF | 10/15/93 | \$200.00 |
| 000224 | MF | 10/31/93 | \$200.00 |
| 000224 | MF | 11/15/93 | \$250.00 |
| 000224 | MF | 12/15/93 | \$300.00 |
| 000224 | MF | 12/31/93 | \$506.25 |
| 000224 | RR | 01/31/93 | \$700.00 |
| 000227 | RS | 04/15/93 | \$675.00 |
| 000231 | SE | 01/15/93 | \$67.50 |
| 000237 | SE | 02/15/93 | \$736.00 |

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|--------------|
| 000238 | SE | 02/28/93 | \$341.25 |
| 000238 | SE | 03/15/93 | \$570.00 |
| 000238 | SE | 03/31/93 | \$190.00 |
| 000238 | SS | 04/15/93 | \$675.00 |
| 000242 | SS | 05/31/93 | \$675.00 |
| 000030 | SE | 02/28/94 | \$617.50 |
| 000030 | SE | 04/30/94 | \$733.00 |
| 000030 | SE | 06/15/94 | \$700.00 |
| 000030 | SE | 09/15/94 | \$700.00 |
| 000031 | RF | 06/30/94 | \$165.75 |
| 000031 | RF | 07/15/94 | \$56.25 |
| 000031 | RF | 07/31/94 | \$255.00 |
| 000031 | RF | 08/15/94 | \$510.00 |
| 000031 | RF | 10/15/94 | \$702.00 |
| 000031 | RF | 10/31/94 | \$170.00 |
| 000031 | RF | 11/30/94 | \$255.00 |
| 000031 | RF | 12/15/94 | \$510.00 |
| 000031 | RF | 12/31/94 | \$510.00 |
| 000033 | JF | 06/30/94 | \$665.00 |
| 000033 | JF | 08/31/94 | \$95.00 |
| 000035 | PM | 08/15/94 | \$500.00 |
| 000037 | DP | 10/31/94 | \$253.25 |
| 000038 | RR | 12/31/94 | \$100.00 |
| 000040 | WW | 05/15/94 | \$665.00 |
| 000248 | BS | 02/15/94 | \$700.00 |

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|------------------------|
| 000250 | BS | 05/15/94 | \$400.00 |
| 000250 | CW | 04/30/94 | \$600.00 |
| 000250 | CW | 05/15/94 | \$697.00 |
| 000250 | CW | 05/31/94 | \$697.00 |
| 000251 | CW | 06/15/94 | \$547.50 |
| 000251 | CW | 06/30/94 | \$675.00 |
| 000251 | CW | 07/15/94 | \$525.00 |
| 000251 | CW | 07/31/94 | \$450.00 |
| 000252 | DP | 02/28/94 | \$675.00 |
| 000263 | JF | 06/30/94 | \$665.00 |
| 000263 | JF | 07/15/94 | \$95.00 |
| 000266 | JG | 05/15/94 | \$285.00 |
| 000267 | JK | 03/31/94 | \$680.00 |
| 000267 | KG | 01/31/94 | \$675.00, plus \$45.00 |
| 000268 | KG | 02/28/94 | \$675.00 |
| 000269 | KG | 04/30/94 | \$600.00 |
| 000274 | MF | 01/15/94 | \$100.00 |
| 000274 | MF | 01/31/94 | \$49.50 |
| 000274 | MF | 02/15/94 | \$200.00 |
| 000274 | MF | 02/28/94 | \$200.00 |
| 000276 | RF | 06/30/94 | \$127.50, plus \$38.25 |
| 000276 | RF | 07/15/94 | \$56.25 |
| 000276 | RF | 07/31/94 | \$225.00 |
| 000276 | RP | 01/15/94 | \$600.00 |
| 000276 | RP | 01/31/94 | \$600.00 |

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|----------------------------------|
| 000277 | RP | 02/15/94 | \$675.00 |
| 000277 | RP | 02/28/94 | \$570.00 |
| 000277 | RP | 03/15/94 | \$675.00, plus \$123.75 |
| 000277 | RP | 04/15/94 | \$450.00, plus \$22.50 |
| 000281 | RR | 07/31/94 | \$700.00, plus \$300.00 vacation |
| 000282 | SB | 02/15/94 | \$700.00, plus \$600.00 vacation |
| 000287 | SE | 04/30/94 | \$655.00, plus \$68.00 |
| 000288 | SE | 06/15/94 | \$700.00 |
| 000289 | SS | 01/15/94 | \$720.00 |
| 000292 | SS | 07/31/94 | \$500.00 |
| 000292 | WW | 05/15/94 | \$665.00 |
| 000019 | SE | 01/15/95 | \$450.00 |
| 000019 | SE | 02/28/95 | \$725.00 |
| 000019 | SE | 03/15/95 | \$675.00 |
| 000019 | SE | 03/31/95 | \$296.25 |
| 000019 | SE | 04/15/95 | \$450.00 |
| 000019 | SE | 04/30/95 | \$685.00 |
| 000019 | SE | 05/15/95 | \$675.00 |
| 000019 | SE | 05/31/95 | \$675.00 |
| 000019 | SE | 06/15/95 | \$720.00 |
| 000019 | SE | 06/30/95 | \$723.00 |
| 000019 | SE | 07/15/95 | \$375.00 |
| 000019 | SE | 07/31/95 | \$675.00 |
| 000019 | SE | 08/15/95 | \$675.00 |

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|--------------|
| 000022 | KL | 06/15/95 | \$650.00 |
| 000023 | PM | 07/15/95 | \$600.00 |
| 000024 | SM | 04/15/95 | \$700.00 |
| 000024 | SM | 05/31/95 | \$700.00 |
| 000024 | SM | 06/30/95 | \$700.00 |
| 000025 | DP | 07/15/95 | \$712.50 |
| 000026 | SS | 07/15/95 | \$700.00 |
| 000002 | JB | 02/15/96 | \$340.00 |
| 000002 | JB | 02/28/96 | \$200.00 |
| 000002 | JB | 03/15/96 | \$340.00 |
| 000002 | JB | 03/31/96 | \$200.00 |
| 000002 | JB | 04/15/96 | \$200.00 |
| 000002 | JB | 01/15/96 | \$680.00 |
| 000002 | JB | 02/28/96 | \$680.00 |
| 000002 | JB | 03/15/96 | \$680.00 |
| 000002 | JB | 03/31/96 | \$680.00 |
| 000003 | JB | 04/30/96 | \$675.00 |
| 000003 | JB | 10/15/96 | \$510.00 |
| 000004 | RC | 01/31/96 | \$470.00 |
| 000004 | RC | 02/28/96 | \$660.00 |
| 000004 | RC | 03/15/96 | \$695.00 |
| 000005 | SE | 01/15/96 | \$600.00 |
| 000005 | SE | 01/31/96 | \$697.50 |
| 000005 | SE | 02/15/96 | \$686.25 |
| 000005 | SE | 02/28/96 | \$600.00 |

| Document Page # | Employee's Initials | Pay Period End Date | Compensation |
|-----------------|---------------------|---------------------|--------------|
| 000005 | SE | 03/15/96 | \$600.00 |
| 000005 | SE | 03/31/96 | \$600.00 |
| 000005 | SE | 04/15/96 | \$675.00 |
| 000006 | KF | 11/15/96 | \$603.00 |
| 000006 | KF | 10/31/96 | \$700.00 |
| 000012 | SS | 11/30/96 | \$710.00 |
| 000013 | DS | 06/15/96 | \$650.00 |
| 000013 | DS | 06/30/96 | \$510.00 |
| 000013 | DS | 08/31/96 | \$505.00 |
| 000013 | DS | 09/15/96 | \$260.75 |
| 000013 | DS | 09/30/96 | \$170.00 |
| 000013 | DS | 11/15/96 | \$475.00 |
| 000014 | BT | 09/15/96 | \$628.00 |
| 000015 | KT | 06/15/96 | \$680.00 |
| 000015 | KT | 06/30/96 | \$680.00 |
| 000015 | KT | 07/15/96 | \$595.00 |
| 000015 | JB | 12/15/96 | \$528.50 |
| 000015 | JB | 12/31/96 | \$690.50 |